

The CURE

Contract User's Resource for Excellence

The "CURE" is a quarterly newsletter of the State Controller's Office

Volume 9, Issue 2

May 2003

News From The SCO A State Controller's Office Update

CCIT MEETING

The May CCIT (Colorado Contract Improvement Team) meeting will be held on Wednesday, May 21st from 9:00 a.m. - 12:00 in Building 100 at Camp George West. Camp George West is located just East of Golden on Old Golden Road. The address is 15055 So. Golden Road. If you have questions about the meeting, please call a member of the Central Contract Unit. A map is located at www.colorado.gov/dpa/dfp/sco/cure/cure.htm.

An agenda is included on page 9.

What's Inside this
Issue

An important note about re-hiring state employees who have been laid off — there are significant legal implications to consider (pages 2—4) .

E-MAIL ADDRESS CHANGES

To make sure you do not miss an issue of the CURE or other important state contract information be sure that you keep your e-mail address current by sending changes to Kevin in the SCO CCU at:

kevin.cruise@state.co.us

Central Approvers Names and Numbers

NAME	PHONE #	FAX #
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Department of Personnel & Administration (DPA)

State Controller's Office (SCO)

Central Contract Unit:	Phone Number	Fax Number
Phil Holtmann	303-866-3809	303-866-4233
Yvonne Anderson	303-866-2862	303-866-4233

Routing, Distribution and E-mail Updates:

Kevin Cruise	303-866-2127	303-866-3569
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Statutory Violations:

John Ivy	303-866-3765	303-866-3569
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Human Resource Services (DPA/HRS)

Personal Services Review Program:

Joi Simpson	303-866-5496	303-866-2458
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State Buildings and Real Estate Programs

Carol Lieber (SBREP)	303-866-3158	303-894-7478
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Donna Barr (REP)	303-866-4564	303-866-2201
Clark Bolser (REP)	303-866-4759	303-866-2201
Bob Marshall (REP)	303-866-2204	303-866-2201

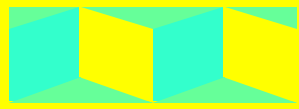
State Purchasing (SPO)

Kay Kishline	303-866-6100	303-894-7440
Monica Rahman	303-866-6155	303-894-7440

Office of the Attorney General (AGO)

Robert Bowers	303-866-5027	303-866-4139
Bea Pagette	303-866-5227	303-866-4139
Steve Smith	303-866-5142	303-866-4139

NOTE: You may e-mail any of the above by using the following format: **firstname.lastname@state.co.us**



An Important Note from the Personal Services Program -

“Knowing the Liabilities for Misclassifying Independent Contractors” by Joi Simpson, Personal Services Contracts Specialist

Due to the budget reductions, the layoff process has started. As a result, some agencies are considering immediately re-hiring laid-off employees from temporary employment services as independent contractors to perform the same or similar work performed as employees. This practice is not permitted under federal and state law and will expose the state to greater potential liability.

Agencies looking to solve their staffing issues with temporary or contingent workers must consider the legal implications of the employer-employee relationship. Relevant factors must be examined to make sure that this type of action does not create potential liability for the state and agencies. Potential liabilities are as follows:

- Under FLSA, penalties for mischaracterization of an independent contractor could include unpaid overtime or minimum wage, liquidated damages, fines, and criminal sanctions. These could triple if the violation is willful and personal liability could be pursued.
- Under the IRS, a percentage of an agency's payroll could be assessed (this fine could triple if the action is done willfully), as well as FICA penalties and potential litigation settlements.

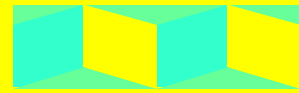
When considering the utilization of contractors, be aware that converting a state employee or a state temporary employee to an employee performing the same function on a personal service contract could violate state law. CRS 24-18-201 prohibits an employee from being retained via a personal services contract within six months of termination. CRS 24-50-507 prohibits employees from accepting any direct or indirect personal benefit from a contracting agency. In other words, an employee cannot obtain a contract with the state to perform work that he or she had a direct interest in, e.g., the job.

If the state hires laid-off employees within six months to continue to perform the same or similar work prior to lay-off, they cannot be considered independent contractors. These individuals will be eligible for benefits, and could have standing to pursue legal action against the state. In addition to agencies being held liable for flagrant violations of federal and state law, individuals who willfully violate the rule in approving such actions could be held personally liable and incur the same fines and penalties.

Current employees are unlikely to qualify as independent contractors. Here are three key determining factors when qualifying an individual as an independent contractor.

1. Behavior control – Does the employer direct or control how the worker performs the task? Generally, someone who is told when, where and how to perform the work, what tools or equipment to use, what workers to hire, where to purchase supplies, and the order in which to do the work, should not be considered an independent contractor.
2. Financial control – What is the worker's investment in the facilities he or she uses, to what extent is the worker making his or her services available to other organizations, how is the worker paid, and can the worker realize profits and losses from the services provided to the state? If one invests in the facilities and tools used, and if one's service is also available to others, this worker may be considered an independent contractor.

Personal Services - Article continuation

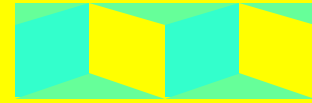


3. Nature of the relationship – Is the organization providing benefits to the worker, are taxes being withheld from the worker's pay, are employer's taxes being paid on behalf of the worker, is the relationship expected to continue indefinitely, and is the service provided by the worker essential to the regular business of the organization? If so, the worker may not be considered an independent contractor.

The following is the common law test most courts continue to apply.

- The greater the skill required to do the job, the more likely the individual is an independent contractor.
- Individual supplies his or her own tools and materials.
- The longer the relationship, the more likely there is an employer-employee relationship.
- The fact that the person who pays for the work has the right to assign additional projects to the worker without additional compensation and without altering the terms of a contract indicates employee status - an independent contractor relationship is generally contractual.
- An employer who determines the work schedule suggests an employment relationship.
- An individual who is paid by the hour or other time period is more likely to be considered an employee.
- Where the employer hires, fires, and pays the individual's assistant (rather than the worker himself or herself), suggests an employee-employer relationship.
- An individual who works in a field that is not the company's ordinary line of business will be more likely be an independent contractor.
- The fact that a worker is in business for himself or herself and has all the appropriate licenses suggests independent contractor status.
- The fact that a worker is treated as an employee for tax purposes indicates an employment relationship.
- Where an individual is integrated into the employer's business to a great extent, the individual is more likely to be considered an employee.
- The establishment of a set amount of work hours suggests employee status.
- The fact that an individual works on the employer's premises suggests employee status.
- An individual who works according to a sequence set by the employer will more likely be deemed an employee.
- An individual who is reimbursed for expenses is more likely an employee.
- An individual's work results in the possible realization of a profit or the risk of a loss suggests independent contractor.
- An individual who works for more than one firm at a time is more likely to be an independent contractor.
- The fact that the employer has the right to discharge the individual suggests an employment relationship.

If an agency were to hire a current state employee (permanent or temporary) to perform the same or similar duties, the agency cannot certify that individual as an independent contractor. Although changing current employees to independent contractors may save some costs, this change would be in violation of federal law, state statute and rules and will put the state at risk for legal action, heavy fines, and IRS penalties.



Finally, here is some reference material on independent contractors. An article published by the International Personnel Management Association (IPMA) in August 2001 (page 19) states, "Laws governing independent contractors, designed to protect workers from being short-changed, have drawn increasing scrutiny and significance with the growth of the contingent workforce in recent years. Under federal and state laws, an independent contractor must be just that - independent. He or she must provide a product or service without punching a time clock or being told how to do the job. 'Very few people qualify as independent contractors,' says Eugene Hartwig, an attorney with Butzel Long in Detroit and a former chair of American Bar Association's Section of Labor and Employment Law. One of the key determining factors is behavior control. Does the employer have the right to direct or control how the worker performs the task for which he or she was retained. Generally, someone who is told when and where to do the work, what tools or equipment to use, what workers to hire, where to purchase supplies, and the order in which to do the work, should be classified as a regular employee, not as an independent contractor..."

In the class action lawsuit, Vizcaino v. Microsoft Corporation, the court found that Microsoft had mischaracterized certain workers as independent contractors. Such workers were originally hired for specific projects and were not eligible for employee benefits; however, some had been kept on, working on successive projects for a number of years. These employees were fully integrated into Microsoft's workforce, worked on site and on work teams along with Microsoft's regular employees, shared the same supervisors, performed identical functions, worked the same core hours as regular employees, and were provided with admittance card keys, office equipment, and supplies.

For more information contact Sue Huang, Compensation Specialist, 303-866-4219 or sue.huang@state.co.us, or Joi Simpson, Personal Services Contracts, 303-866-5496 or joi.simpson@state.co.us.

**On the World Wide Web at :
www.colorado.gov/dpa/dfp/sco/**

**CONTRACT PROCEDURES AND MANAGEMENT
MANUAL
[contract/contractprocedures.htm](http://www.colorado.gov/dpa/dfp/sco/contract/contractprocedures.htm)**

**CURE
[cure/cure.htm](http://www.colorado.gov/dpa/dfp/sco/cure/cure.htm)**

**PERSONAL SERVICES REVIEW PROGRAM
AND RELATED FORMS**

www.colorado.gov/dpa/dhr/oversight/contracts.htm



Contract Law - from A to Z

***By Jim Schoendaller, Purchasing Director
Colorado Department of Public Safety***

With thanks to Dan Frelund, my supervisor, I was able to take a Contract Law class through the Paralegal Program at Arapahoe Community College. The class met for 1 semester, was 3 credits and the cost (including in-State tuition and book) was about \$300.00. My professor was Dr. Barbara Borow-Stephens.

If you are interested in expanding your knowledge of contract law, I heartily recommend this class. It might be especially useful for those who are relatively new to the world of State contracts (and Purchase Orders). I attained an insight into contract law that enables me to better understand the State's position. I am now aware (of some) of the possible legal consequences of our actions.

This deeper understanding of contract law should allow me to offer a higher level of service to the State and my customers. It will assist me in reviewing (and helping with) the statement of work to ensure that the required elements are present and the language is not ambiguous. I now feel more confident in reviewing any contractual language that the vendor/contractor provides. I also know what some of our options might be if there's a breach.

This class provides in-depth discussion about the numerous components of contract law. It goes way beyond Business Law in that it offers a detailed, behind-the-scenes view of the rationale behind contract law, procedures and provisions. Both the UCC (Article 2) and the common law were discussed and contrasted. My past Procurement training has included mainly the UCC focus and the common law perspective was helpful, considering that all of our contracts for services are covered by the common law. An important thing I learned was "why" we use many of the procedures and provisions that we do.

We read the entire book (Contract Law for Paralegals by Melinda R. Thomas), including 23 actual cases. The 13 chapters covered the following topics: Applicable Law; The Nature of Offers; The Nature of Acceptance; Consideration; Contract Terms; Performance and Breach; Excuse and Discharge of Obligations; Defenses to Formation and Enforcement (3 chapters); Remedies; Assignment and Delegation; and Third-Party Beneficiaries.

The lectures were very well presented and Barbara's knowledge was extraordinary. Besides several handouts and study guides, Barbara related examples from when she was a practicing attorney (15 years) to reinforce the material. She presented the complex material clearly and didn't seem to tire of my questions that always began with, "The State does..."

This was not an "easy" class, and according to the Paralegal degree-seeking students in the class, it is one of the hardest classes in the curriculum. There wasn't much homework per se, but there was weekly reading. The 2 exams were challenging (lots to remember) but the contract-drafting project was easy (in my opinion). Class details can be found online (www.arapahoe.edu) and the campus is a short walk from the Littleton Downtown Light Rail station. The contract law class (PAR 118) is listed in the fall catalog: Wednesdays, 11:30 – 2:15 p.m. and Tuesdays, 6:00 – 8:45 p.m. Classes start in late August and end in December.

PCP PERSONAL SERVICES TRAINING

**by Joi Simpson,
Personal Services
Contracts Specialist**

The PCP Personal Services Contracts training is currently being revamped. Based on customer feedback received from evaluations over the past year, DHR will begin in June 2003 offering two levels of Personal Services Contracts PCP training – Level 1 and Level 2. Below are descriptions of each class and a schedule.

Level 1 is a basic training on personal services contracts. Topics will include what you need to know to get started in reviewing personal service contracts, the requirements for HR professionals, an overview of statutes and procedures, flow charts of the contract review process, and the basics for determining an independent contractor. The course is approximately 6 hours. All classes are from 9:00 a.m. – 4:00 p.m. at 1313 Sherman Street.

Monday, June 16 – Room 318
Thursday, August 21 – Room 220
Thursday, November 20 – Room 220

Level 2 is an advanced training focusing on contract requirements. Topics will include in-depth review of personal services contracts, including required language, the required elements of a Cost Comparison and how to complete the form, and an introduction to performance-based contracting and outsourcing. The course is approximately 4.5 hours.

Thursday, July 17— Room 220
Thursday, September 18— Room 220
Tuesday, October 28—TBD

The July 17 and September 18 classes are from 9:00 a.m. – 2:00 p.m. at 1313 Sherman Street. The October 28 class TBD after the HR Network Meeting.

Both levels of training are required for HR professionals seeking PCP Certification. For those professionals currently certified in PCP Contracts, you will have one year to complete Level 2 Advanced training to retain current certification.

To reserve a seat please, contact Judi Karg at judi.karg@state.co.us or 303-866-2391. Space is limited.



A G N o t e s

The Indemnification Special Provision in Intergovernmental Contracts

By Robert Bowers, AGO

As of December 1, 2001, pursuant to an amendment in Fiscal Rule 3-1, state agencies must use one of two different sets of Special Provisions in all State Contracts. One set of Special Provisions is designed to be used only in intergovernmental contracts; the other set is to be used in all other contracts. By developing a narrowly tailored set of Special Provisions for use only in intergovernmental agreements, it was hoped that agencies would be able to process this class of contracts more expeditiously. Note: during the 2001 rule-making process, several edits were made to the Intergovernmental Special Provisions to remove what was thought to be inapplicable and ambiguous language. Unfortunately, some very important language was deleted from the intergovernmental version of the Indemnification Special Provision. As a result, much time has been spent at the agency level, the State Controller's office, and this office (including the Solicitor General, Alan Gilbert) trying to correct this unfortunate edit.

For those of you that don't remember, the words "to the extent authorized by law" used to be the introductory clause in the indemnification Special Provision (i.e. To the extent authorized by law, the Contractor shall indemnify, save, and hold harmless the State, ...). As noted above, this language was deleted from the Intergovernmental Special Provisions at the recommendation of various individuals (including myself) without a full understanding of its significance. It has since been re-inserted into the Intergovernmental Indemnification clause pursuant to recent rule-making activity (which is due to become effective June 30, 2003).

As there is a current state-wide blanket Fiscal rule waiver in effect allowing the re-insertion of these words into all intergovernmental agreements and because the Solicitor General (my boss) has told me to reject any intergovernmental contracts that do not contain this language, I am asking you to please re-insert these words! Finally, at the risk of causing confusion, please do not insert these words in non-governmental contracts.

As always, if you have questions, please give me a call.



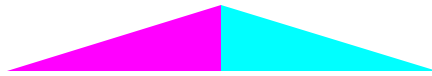
IMPORTANT REMINDERS...

State Controller Policy Updates (effective 2/10/2003): The State Controller has updated all the policies related to State Contracting. The policies are: Advance Payments to Vendors, State Contract Modifications, Contract Dating, Executing State Contracts with a Fiscal Year Value of \$50,000 or Less, and Mixed Procurements.

The policies are conveniently located on the SCO website. All contract personnel are encouraged to review the policies and the requirements. If you need assistance or have questions, please feel free to call Phil Holtmann or Yvonne Anderson.

TRAINING NOTE: Contract management and contract writing is available through the State's Training Academy. **All contract personnel** are highly encouraged to attend these classes. So... if you are new to the state system or you are in need of a refresher course, please sign up today. Classes are on-going and can be tailored to meet agency needs. For more information, please call Brad Mallon at 303.866.4265.

REAL ESTATE FORMS NOTE: Don't forget that the Lease Extension Agreement form formerly used to extend the term of a Lease Agreement for state tenants **is no longer being used**. As of July 1, 2002, agencies and institutions should be using the Amendment to Lease form for all lease amendments, including extension of the lease term. If you have any questions about this policy change, call Donna Barr, Real Estate Asset Manager



CCIT (Colorado Contract Improvement Team) Meeting

Wednesday, May 21, 2003

Camp George West – Golden, Colorado – Building 100

Agenda

9:00 — 9:05	Welcome	Phil Holtmann, SCO
9:05— 10:00	Personal Services Update	Joi Simpson, DPA/HRS Don Fowler, DPA/HRS
10:00—10:20	State Buildings Update	Carol Lieber, DPA/SBP
10:20—10:35	B - - - R- - -E- - -A- - - K	
10:35—11:00	Real Estate Programs Update	Clark Bolser, DPA/SBP
11:00—11:30	Legal Issues	Steve Smith, AGO
11:30—12:00	Fiscal Rule Update	Phil Holtmann, SCO

